FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. 2677

ALBERT G. GLASS,

Petitioner

—v.—

PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LOUIS BENDER
MOSES KOVE
170 Broadway
Counsel for Petitioner

July 25, 1960.

32 CAM PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statute and Constitutional Provision Involved	4
Statement of the Case	4
Petitioner's Inability to Testify in His Own Behalf	5
The Trial Court's Prejudicial Conduct and Remarks Published in the Local Press and Broadcast on Radio	14
Reasons for Granting the Writ	19
Conclusion	32
Appendix A	33
Appendix B	36
Appendix C	38
Appendix D	39

Cases Cited

Briggs v. United States, 6C, 221 F. 2d 636, 1955	29, 30
Coppedge v. United States, 272 F. 2d 504 (1959)	27
Eastland v. State, 223 Miss. 195, 78 So. (2d) 127	25
Eskridge v. Washington State Board, 357 U. S. 214	23
Eyer v. Brady, 128 F. 2d 1012, 1014 (C. C. A. 4, 1942), cert. den. 317 U. S. 679	22

PAGE

Glass v. Markewich, 6 App. Div. (2d) 793 ..... 2, 12
Gordon v. United States, 6C, 178 F. 2d 896 31
Griffin v. Illinois, 351 U. S. 12 23
Griffin v. United States, 3C, 295 F. 437 29

Kerrains v. People, 60 N. Y. 221 21

Marshall v. United States, 360 U. S. 310, 79 S. Ct. 1171 31
Massey v. Moore, 348 U. S. 105 24
Matter of Brandenburg v. Court of General Sessions, 189 Misc. 4 12

People v. Berling, 115 Cal. App. 2d 255, 251 P. 2d 1017 24
People v. Duncan, 350 P. 2d 103 (Cal.), 1960, cert. granted by this Court 1075 Misc. on June 27, 1960 29
People v. Hinksman, 192 N. Y. 421 19
People v. Levan, 295 N. Y. 26 21
People v. McGeoghegan, 325 Ill. 337, 156 N. E. 378 .. 31
People v. Murawski, 394 Ill. 236, 68 N. E. 2d 272, 1946 28

Re Oliver, 333 U. S. 257 21

Shepherd v. State of Florida, 341 U. S. 50, 70 S. Ct. 549, 95 L. Ed. 740 29
Snyder v. Massachusetts, 291 U. S. 97 22
Sollars v. State, 316 P. 2d 917 (Nev.), 1957 28

United States v. Powell, 171 F. 2d 202 (D. C. Cal.) .. 31

Williams v. People of the State of New York, 337 U. S. 241, 69 S. Ct. 1079 31
Wilson v. United States, 149 U. S. 60 22

Statutes Cited

	PAGE
United States Code:	
Title 28, Sec. 1257(3)	3
Code of Criminal Procedure:	
Sec. 393	4
New York State Constitution:	
Article 13, Sec. 4	4, 19
United States Constitution:	
14th Amendment	3, 23, 24, 26

Miscellaneous

58 Am. Jur., Witnesses §173	23

IN THE

Supreme Court of the United States

October Term, 1959

No.

ALBERT G. GLASS,

Petitioner

—v.—

PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ALBERT G. GLASS, your petitioner, prays that a writ of certiorari issue to review a judgment of the Court of Appeals of the State of New York (Appendix A, *infra*), affirming a judgment of the Appellate Division of the Supreme Court of the State of New York, which affirmed a judgment of an Extraordinary Special and Trial Term of the Supreme Court, Suffolk County, convicting petitioner of offering and giving bribes and of conspiracy for the perversion and obstruction of justice and of the due administration of the laws. A stay of the judgment pending the determination of this petition was granted May 10, 1960 by Hon. Stanley M. Fuld, an Associate Judge of the Court of Appeals.

Opinions Below

No opinions were delivered by the New York courts upon the rendering of the judgment.*

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on April 28, 1960 (Appendix A, *infra*).

The remittitur of the Court of Appeals was amended by order of that Court (Appendix B, *infra*) dated May 19, 1960 to add the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the denial of the motions of the defendant Glass made during trial for a mistrial and a severance upon the ground that he was then unable to testify in his own defense because of his physical condition violated his rights to due process of law and the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. This Court held that the rights of the defendant Glass under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

The additional ground asserted herein that petitioner was deprived of a fair trial in violation of the XIVth

---

* An opinion was rendered by the Appellate Division in a collateral proceeding, *Glass* v. *Markewich*, 6 App. Div. (2d) 793 (Appendix D, *infra*).

Amendment by the prejudicial conduct and remarks of the Trial Court publicized in the local newspapers and on the radio was raised in the Trial Court by a motion for a mistrial (R. 1600, 1610) and in Pt. III of the brief submitted to the Court of Appeals of the State of New York. Present counsel who recently substituted for counsel for petitioner in the New York Court of Appeals were precluded from moving to amend remittitur of the New York Court of Appeals since the Court does not reconvene for such motions until October 1960.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1257(3).

Questions Presented

1. Does the Fourteenth Amendment permit a State to try a defendant in a criminal case over his objection at a time when, although he wishes to testify in his own defense, he is then unable to do so due to grave illness except at risk to his life, as certified without contradiction by doctors appointed by the trial court?

2. Was petitioner's right to a fair trial guaranteed by the due process clause of the XIVth Amendment violated by prejudicial conduct and remarks by the Trial Court denouncing petitioner in the presence of the local press and with knowledge that his conduct and remarks would be, and in fact were, publicized and likely to be read by the jury?

Statute and Constitutional Provision Involved

Code of Criminal Procedure (McKinney's Consolidated Laws of New York, Book 66, Part 2) *Sec. 393. Defendant as witness.*

> "The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him."

New York State Constitution (McKinney's Consolidated Laws of New York, Book 2, Part 2) *Article 13, Sec. 4. Person Bribed or Offering Bribe May Testify.*

> "Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor."

AMENDMENT XIV

> "Section 1. * * * ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The judgment of conviction was entered against petitioner on November 26, 1958. He was found guilty on June 5, 1958 by a jury, after it had deliberated for three days, upon ten counts of an indictment. Also convicted was a co-defendant John A. Britting.

Britting was the Deputy County Treasurer of Suffolk County, and the indictment had to do with the purchase by

petitioner, who was in the real estate business, from the office of the County Treasurer, of certain properties previously acquired by the County for unpaid taxes, and the later participation by Britting in the profits resulting from subsequent resales thereof. The indictment also named as defendants Britting's wife and petitioner's mother, neither of whom was tried, their cases being severed, and dismissed following the conviction of the men.

Each of the nine substantive counts (R. 47-50; 52-57; 59-60)* of which petitioner was convicted charged that he offered and gave a bribe to Britting with the intent to influence Britting in respect of his official acts, viz. to issue to petitioner only, and to no other person, a deed to certain real property together with the bill of the amount required to be paid by law to the Treasurer for such property, in violation of Penal Law, Sec. 1822 (Appendix C, *infra*). The conspiracy count (R. 7-23) charged a conspiracy for the perversion and obstruction of justice and of the due administration of the laws in connection with the sale by the County Treasurer of these properties in that Britting would reserve such lands for petitioner alone, in violation of Penal Law, Sec. 580(6) (Appendix C, *infra*).

Petitioner's Inability to Testify in His Own Behalf

On May 13, 1958, during the presentation of the prosecution's case, petitioner moved for a mistrial and a severance, upon the ground that the physical condition of petitioner, who suffered from a very serious heart ailment, had deteriorated during trial to a point where he could not then

* References are to pages of the certified printed Record.

take the stand and testify in his own defense without endangering his life (R. 1134-1137; 1024-1026).

It was so certified in writings dated May 12, 1958 by Dr. William Wolins, the Chief of Medicine at the Central Suffolk Hospital, and by Dr. Louis A. Stein, who had been petitioner's physician for a number of years (Exhs. F1 and F2, R. 2204, 2205, 1136).*

When this application was made, the trial court made the following statement (R. 1145, 1146):

> "I noticed that both of the certificates say something very carefully. They don't say that it is dangerous for this man to continue to stand trial. They refer only to his capacity to testify as a witness. That is not the same thing. It may be arguable that one can not stand trial if he is told that it would endanger his life to testify. I don't know the answer to that question. I have no recollection of ever having seen that anyone has ever passed on it, as to whether the two things are one and the same. I would welcome anything that you can find in the authorities along those lines. Personally, I doubt if it is the same thing. * * *

---

* Dr. Wolins had been called in to treat petitioner on April 23, 1958 during the selection of the jury, because Glass had developed coronary pain which did not subside with the administration of drugs, and a motion for a mistrial and a severance had been made (R. 247) on April 24, 1958 based upon Dr. Wolins' report of this occurrence (Ex. F, R. 2202, 253) and upon documents and reports from five other physicians who had at various times prior to the trial either examined or treated petitioner (Exhs. A through E, R. 2184-2203; 248-253). Two of these (Exhs. A and B) were communications from doctors to other doctors during treatment in 1955 and 1956. That motion was denied (R. 268) as being without sufficient basis at that time, but the court asked to be advised promptly during the trial of anything which might be required to be done in order to preserve petitioner's health.

> "I wonder if it isn't necessary to find that he is actually psychotic before I am justified in granting the relief that you seek, and as I say, that is balanced by the necessity, if he should be so found, to do something about it."

The court stated that the question of whether petitioner could continue the strain "of standing trial" (R. 1144) was for medical experts to say; that the court would appoint physicians of its own choice to examine petitioner and report thereon; that the trial would be recessed for a sufficient length of time to permit whatever kind of examination such doctors would consider adequate and necessary (R. 1146-1150).

The court said that the best way to get the ablest physicians available, who would be completely impartial, would be for it to use for this purpose the court's medical report office, which in cooperation with the New York County Medical Association customarily furnishes upon request to the Supreme Court in New York City impartial medical advice (R. 1150-1151).

For this purpose the trial was recessed from Tuesday, May 13, 1958 until Monday, May 19, 1958 (R. 174, 1275).

The physicians thus selected by the court were Dr. A. Wilbur Duryee an eminent cardiologist, and Dr. Peter G. Denker, an eminent neuropsychiatrist. They were requested to report to the court as to whether or not court appearance and testifying would endanger petitioner's health; whether he suffers from a condition which he is able to feign or simulate; and if he is able to testify or appear in court, what safeguards should be taken.

The eight reports by the seven other physicians who had either attended or examined petitioner over a period of years which had theretofore been marked Exhibits A through F2 (see footnote p. 6 *supra*) were photostated and delivered to the two physicians for their study prior to their examination of petitioner (R. 1247-1249).*

Both physicians then gave petitioner a thorough examination which included an electrocardiogram.

Dr. Duryee thereafter reported back to the court (Court's Exhibit 2, R. 2213-2217, 1277) in pertinent part as follows:

> "I believe it would be dangerous for this man to testify in court and probably also dangerous for him to appear in court if he is put under emotional stress and strain. * * *
>
> "He suffers from a clear cut picture of coronary insufficiency which he has relatively no control over and he has no heart condition which he simulates or feigns."

---

* The past medical history of petitioner, who was 55 years old, as derived from the physicians who had attended him since February 1955 and from electrocardiograms made at various times during the three or four years preceding the trial, was as follows: he had had a heart attack in 1952 and a second attack in December 1954 when he was hospitalized for five weeks, and a third attack in February 1955 while he was still in the hospital recuperating from the attack of December 1954. As a result of the third attack he was hospitalized for six weeks and lost 70 pounds in weight.

All the physicians who had seen him agreed that there was unmistakable electrocardiographic evidence of these recurrent infarctions, that he had angina pectoris and atherosclerosis of the coronary arteries, and had been a semi-invalid since February 1955, suffering from episodes of acute coronary insufficiency which followed upon any nervous or emotional excitement, that he was a very tense, emotional person and that it was of the greatest importance for him to avoid any nervous or emotional excitement because such excitement would precipitate another episode (R. 104-106, 2184-2186, 2187, 2190, 2192-2194, 2199, 2202).

Dr. Denker's report to the court (Court's Ex. 2, R. 2218-2220, 1278) stated in pertinent part:

> "I do not feel this person is exaggerating or malingering his emotional disabilities. In view of the serious nature of his heart disease, as well as the emotional instability present on my examination, I feel it would be distinctly hazardous to his life if he were called upon to testify in the pending litigation. I do not feel this patient is malingering."

The court during the recess, without then disclosing to counsel the contents of these communications, transmitted a written message to the two physicians (Court's Ex. 4, R. 2221, Court's Ex. 5, R. 2224; 1278) in which it was stated that certain precautions were being taken (*i. e.*, sessions had been curtailed, starting at 10:30 A. M. on Mondays and at 10 A. M. on other days, recessing at noon, reconvening at 1:30 P. M., and recessing at 4 P. M. with a five to ten-minute recess midway in the afternoon session), and the following two additional questions were put to the physicians:

> "Will the taking of these precautions put the defendant in any more danger than he might anticipate should he continue with ordinary daily routine outside of court?
>
> "If Mr. Glass decides that he will take the stand and testify in his defense (which he is under no compulsion to do) instructions will be given to the attorney general to be as gentle as possible and there will be as many rest periods as may be asked for; would this impose any burden more onerous than that of merely sitting in the courtroom during the proceedings?"

To this inquiry Dr. Duryee replied (Court's Ex. 6, R. 2225, 1278) in pertinent part:

> "In answer to question one I feel definitely that the tensions of any courtroom procedure would in most cases place the defendant in more danger than the ordinary daily routing outside of the courtroom. This defendant is highly emotional and it would be my opinion that courtroom procedure would because of this affect his circulatory problem to a point where health and life would be endangered.
>
> "In answer to question two I am of the opinion that taking the stand and testifying would impose a greater burden on his circulation than merely sitting in a courtroom."

Dr. Denker replied to the court's supplementary questions (Court's Ex. 7, R. 2226, 1279) in pertinent part:

> "My response to the two questions asked of me would be 'yes' to both questions. I feel that despite the precautions taken, one could reasonably state that the defendant would be in greater danger of a heart attack under the circumstances mentioned, than in 'the ordinary daily routine outside of court'. Likewise taking the stand and testifying in his defense would impose a greater burden than that of merely sitting in the courtroom during the proceedings.
>
> "In amplification of the above, I again wish to point out that according to Dr. Duryee's cardiac opinion, that this patient is suffering from serious heart disease and could get another coronary episode at any time; all the more so when under emotional stress. This unquestionably, in my opinion,

would be a more likely hazard either when he is listening to testimony relevant to his trial situation, or when testifying himself. I do not feel this patient is malingering or exaggerating his symptoms. Lastly, I would like to point out to the Court the famous statement of Dr. John Hunter, the eminent British surgeon, who when suffering from angina pectoris, put his situation very neatly by stating, 'my life is at the mercy of any scoundrel who cares to excite me: I feel the situation in this case to be completely analogous."

On May 19, 1958 (the next court session) the court reported the entire correspondence to counsel, making it part of the record as Court's Exhibits 2 to 7 inclusive, but continued to reserve decision on the application for a severance and mistrial (R. 1279).

On May 20th, 1958 the motion was renewed (R. 1337, 1338) and at the conclusion of the prosecution's case on that day it was denied (R. 1420-2). Petitioner's counsel stated that he was foreclosed from putting in a defense because petitioner would not be able to testify in his own defense (R. 1519, fols. 4557-8).

On May 22nd, 1958 petitioner's counsel stated (R. 1527, fol. 4581) that he could not take the responsibility under the circumstances of calling the petitioner to testify, despite the fact that petitioner wanted to testify in his own defense, and had testified before the grand jury (R. 1530, fol. 4589).

On May 28th, 1958 the defendants rested, subject to petitioner's motion, which was renewed, and denied, for a severance and a mistrial (R. 206-207) upon the ground

that he was unable to proceed and could not proceed with the completion of the defense (R. 1781, 1787).*

On July 9, 1958 the reports of two more physicians selected by the trial court were made part of the record (Court's Exhs. 9 and 10, R. 2228-2237; 2072-2073). These were Dr. Irving Wright, a cardiologist, and Dr. Saul Heller, a neuropsychiatrist, who examined petitioner at the court's request from June 23 to June 27, 1958 at the New York Hospital, to determine whether imprisonment would endanger his life. Both physicians were informed of statements in petitoner's motor vehicle license applications in 1955 and 1957 which minimized the gravity of his condition at those times (R. 2229).

Dr. Wright's report to the court stated in pertinent part:

> "It is my opinion that incarceration of this man in a prison would very markedly endanger both his health and his life."

Dr. Heller's report to the court stated in pertinent part:

> "It is my opinion that this patient's life would be jeopardized if he were to be imprisoned."

* Petitioner applied to the Appellate Division of the Supreme Court for an order in the nature of prohibition to halt the trial which application did not come on to be argued before that court until May 29, 1958, by which time the trial testimony had been closed, and was not decided until June 2, 1958, by which time summations of counsel to the jury were in progress. That application was denied with an opinion (*Glass* v. *Markewich*, 6 App. Div. (2d) 793). (Appendix D, *infra*). Such an application could only have been granted under New York law if the trial court was acting or about to act without or in excess of jurisdiction, and if the regular processes of appeal would afford no protection to the applicant. *Matter of Brandenburg* v. *Court of General Sessions*, 189 Misc. 4, citing many decisions.

Petitioner renewed his motion for a severance and a mistrial, and moved to set aside the verdict, on the ground that his having been compelled to proceed with the trial in the physical condition in which he was, had violated his rights under the Federal and State Constitutions (R. 2073), and his right to a fair trial under the New York Code of Criminal Procedure and the motions were denied (R. 2074).

On November 26, 1958 petitioner was sentenced (R. 2139-2141, 242-244) on each of six of the substantive counts to pay a fine of $5000. (an aggregate of $30,000.), and to imprisonment from one year and six months to three years in a prison hospital, but execution of the sentence of imprisonment was suspended upon the following conditions (R. 2127, 2140, 243):

> 1. He is immediately to cease and refrain from active engagement in his business.
>
> 2. He is to conduct himself as he is advised by competent medical authority.
>
> 3. He is to surrender forthwith his driver's license for cancellation.
>
> 4. He is not to operate any powered vehicle including motor boats.
>
> 5. Within the limitations of medical advice he is to continue cooperating with the attorney general.

At the time of imposing this sentence the trial court stated (R. 2122-2124) as follows:

> "• • • But I am faced with the proposition that this is a very sick man. Court's Exhibits 9 and 10 in evidence, placed into the record after the conviction, are the reports of Doctor Wright and Doctor Heller,

and they indicate without doubt that to confine this defendant in prison might very well have extremely serious consequences. Now, although I am charged with the duty of pronouncing the ultimate judgment upon this defendant as far as the case is concerned, the law does not make me his executioner, and I have no intention of acting as such. I cannot fly in the face of these medical reports. I cannot send this man to prison and I will not send him to prison—let us understand that at the outset—because I am not going to be placed in the position of flouting the reports of competent medical men. * * *

"Now, I know that viewed as a cold proposition, to send him to prison and to direct that he be confined in the hospital in the prison sounds as if this would be the best way to look after him. I know that is not so, because psychologically it is untrue. There is that about confinement itself which would be dangerous to this man."

The Trial Court's Prejudicial Conduct and Remarks Published in the Local Press and Broadcast on Radio

An Extraordinary Term was convened by the Governor to investigate corruption in Suffolk County. For a period of more than two years prior to the trial, the State Commissioner of Investigation, and after him, a Special Prosecutor named by the Attorney-General, as well as a District Attorney appointed by the Governor, had investigated the County, and a number of indictments had eventuated. Various other aspects of the investigation had reached the courts in proceedings preliminary to the present trial.

This activity, quite naturally, was widely reported and commented upon in the local press and radio, and was made the subject of heated and partisan political debate in several political campaigns, including the campaign for District Attorney of Suffolk County. Feelings pro and con ran high, with respect to the activities of the defendant Britting, among others. After many years of service as Deputy County Treasurer, he had been elected to the Assembly. Accusations of "land grabs" were made in the press, accompanied by charges that the County had been defrauded out of great sums of money.

The feelings were heightened as the County, for many years, had been predominantly Republican in politics, while the Commissioner of Investigation, the Governor who appointed him, and the Special Prosecutor who succeeded to the conduct of the investigation of the County, and who indicted Britting, were prominent Democrats. Britting himself was a leading Republican, active in local politics. It was freely charged that political considerations were involved in the investigation. Regardless of the truth or falsity of such talk, it is beyond dispute that these matters were hotly debated, received wide publicity, and for a long time dominated thinking in the County.

Notwithstanding the strong emotional attention of the community and the presence of newspaper and radio reporters, the Trial Court, after the opening statements to the jury, did not admonish the jury against reading the newspapers and listening to radio reports of the case but, on the contrary, expressly sanctioned them, saying, "I am not going to be so unrealistic as to forbid you to read newspapers. That is utterly ridiculous" (R. 367). With

this unfortunate permission, the following events occurred which led to petitioner's motion for mistrial.

Despite the uncontradicted medical reports concerning petitioner's condition and the admitted belief of the Court, as indicated during the trial (R. 1526) and at the time of imposing sentence (R. 2122-2124), that the petitioner was a very sick man, on May 22 in open court, in the absence of the jury but in the presence of newspaper reporters (R. 1616), the Trial Court, without apparent reason whatever, voluntarily denounced the petitioner in such an intemperate and unjudicial manner as to reveal an overpowering bias and hostility (R. 1515-32). Without warning, the Court recorded its "observation" of petitioner's smoking a cigarette and driving a car (R. 1520). The Court professed "consternation", "amazement" and "outrage". He labelled petitioner's conduct as being in contempt of court and suggested that he should be committed (R. 1527, 1528). Remarking that observation "revealed that petitioner's car bore only one license plate", the comment was made, "the thought went swiftly across my mind that this is maybe part of the man's pattern that the rules and laws that apply to other people don't apply to him * * *" (R. 1517-18). The Court stated further, "In order to make assurance doubly sure", he peered out the window of his hotel room to conduct a surveillance of the parking lot (R. 1520). Meanwhile he gave some thought to "the danger that would be involved" in one with Glass' heart condition driving an automobile (R. 1521). A few minutes later another of his anonymous informants observed that petitioner had again been seen driving a car (R. 1521). This information "really moved" the Judge and he thought "it might be interesting

to observe what, if anything, he (Glass) had told the Bureau of Motor Vehicles about his condition" (R. 1521-22). So on May 21 he directed the Attorney General to get for him the records at the Motor Vehicle Bureau, "having no investigative facilities of my own" (R. 1523). After describing allegedly inconsistent statements concerning petitioner's health disclosed by the Court's *ex parte* investigation of his motor vehicle applications, the Court very frankly said, "which is true • • • I do not know" (R. 1525) and "I don't know what the explanation is and I don't care" (R. 1526). The Trial Court added that he had "a right to be outraged" because petitioner had urged his physical condition as a ground for mistrial (R. 1529). He thought it might have been "contemptuous" (R. 1527); this, in the face of the fact that doctors appointed by himself attested to the merit of the application. "I am concerned", said the Judge, "as a member of the community, if, being as sick as he says he is, he has a license and if he is as sick as he says he is, he is using it fraudulently • • • " (R. 1531). At the time of the denial of the motion for the mistrial, the Court saw fit to mention an additional bit of information, also acquired by him *ex parte* from an unnamed informant, that petitioner had been for a ride on a boat the "weekend before" (R. 1613). Again petitioner was berated—his actions, presumably referring to his motions for a mistrial, "verged on the contemptuous." Prior to May 22, all motions had been heard in chambers out of the presence of reporters. The Judge's own election to depart from his prior practice and, in this instance, to make his attack on petitioner in open court enabled the reporters to quote his remarks, as such, in the newspaper stories and over the radio. The Trial Court knew at the time that he made these remarks that

the press were in the courtroom (R. 1616) and he anticipated there might be publicity to the incident (R. 1614). The Court's remarks were, as expected, faithfully recorded and published in the Long Island Daily Press and in Newsday, the two daily newspapers widely read in Suffolk County where the trial was conducted, and published in a manner which could not have failed to reach the attention of the jurists. The Court, having previously sanctioned the reading by the jury of newspaper accounts of the trial (R. 367), made it inevitable that the offending items would come to their attention. The jurors were thus exposed to a newspaper report which stated that a Supreme Court Justice "tongue-lashed" petitioner for a half-hour, "accusing him of trifling with the Court about his ill health," and of being in contempt of court, and which recorded that the Court was outraged at the petitioner (Petitoner Glass' Ex. BB; R. 2206-07); to another newspaper article quoting the Judge as calling petitioner a "liar" and "one who seems to have a complete disregard for the law", and one who is fraudulently using his driver's license (Petitioner Glass' Ex. CC; R. 2208-10); and to radio broadcasts to the same effect (Petitioner Glass' Ex. DD; R. 2211-12). Upon a motion for a mistrial by petitioner, predicated on the fact that the publication of the Court's remarks made it impossible for petitioner to receive a fair trial, the Court denied the motion without any attempt to determine whether the jurists had read the articles or heard the radio broadcast and without any attempt to instruct them to disregard these articles and reports which undoubtedly came to their attention. Even when the Court came to charge the jury at the conclusion of the case, it never told them to ignore what they read or heard over the radio about the case.

Reasons for Granting the Writ

1. The New York Court of Appeals by its judgment of affirmance has decided federal constitutional questions of substance, viz. that a defendant's rights to due process and equal protection of the laws under the Fourteenth Amendment are not invaded by trying him over his objection at a time when his physical condition is such that he is unable to testify in his own defense without endangering his life; and that these rights are not invaded by such a trial, although the State Constitution and statute, without limitation, give every defendant the right to testify in his own defense.

In *People* v. *Hinksman*, 192 N. Y. 421, 431, the New York Court of Appeals said:

> "The law in this state governing the right of accused persons to testify in their own behalf is now contained in section 393 of the Code of Criminal Procedure which provides that 'The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him.' This section of the Criminal Code is identical in scope and effect with the statute of 1869, which remained in force until 1886, by which a person accused of crime was given the right to testify in his own behalf, and it will be observed that the privilege is conferred without limitation or qualification."

Equally without qualification or limitation is New York State Constitution, Art. 13, Sec. 4 (set forth *supra*, p. 4) which has been a part of the Constitution since 1874, that "any" person charged with offering a bribe, as was peti-

tioner, shall be permitted to testify in his own behalf in any criminal prosecution therefor.

The courts below have necessarily held that a fair trial may nevertheless be had without compliance with these provisions, if the defendant is too sick to be able to take advantage of them at the time without risk to his life.

Petitioner wanted to testify in his own defense (R. 1530), but two impartial specialists (Drs. Duryee and Denker) selected by the court had reported to the court that petitioner as of May 13, 1958 could not testify without endangering his life. Their statements were uncontradicted; they substantiated equally unequivocal statements to the same effect by Drs. Wolins and Stein; and they were corroborated by the findings of two more court-selected specialists (Drs. Wright and Heller) that imprisonment would also endanger petitioner's life. The doctors said that petitioner was not malingering; so did the trial judge (R. 266). The trial court's complete agreement as to the gravity of petitioner's illness can best be gauged from the unusual conditions which it put upon its suspension of a sentence of prisonment (p. 13, *supra*), commencing with the extraordinary provision that the petitioner was to refrain altogether from engaging in any business! Statements made in petitioner's motor vehicle operator's license applications in 1955 and 1957, which minimized the gravity of his condition at those times, were obviously incorrect, and were considered to be incorrect by the trial court, since the trial court required him to surrender such license for cancellation, stating that petitioner was too ill to have a license and had concealed from the Motor Vehicle Bureau the true nature of his illness (R. 2132).

Intent was an essential element of the crimes charged against petitioner (see Appendix C, *infra*), and it has long been the well established New York law of evidence that in such case a defendant may give testimony concerning his intent, and exclusion of such testimony has resulted in the reversal of convictions. *Kerrains* v. *People*, 60 N. Y. 221; *People* v. *Levan*, 295 N. Y. 26. Furthermore, the evidence against petitioner was circumstantial in nature (R. 1932). This made it more than usually important, therefore, that petitioner have an opportunity to present his explanation of the circumstances. Even without such explanation it took three days for the jury to reach a verdict.

The problem is therefore squarely presented by the facts of this case whether a fair trial includes the right of a defendant to testify in his own defense.

This Court in *Re Oliver*, 333 U. S. 257, 273, 275, in discussing the rights of one charged with contempt by a State one-man grand jury, said:

> "We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, *to offer testimony*, and to be represented by counsel. * * *
>
> "Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a

> reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, *and have a chance to testify* and call other witnesses in his behalf, either by way of defense or explanation." (Italics supplied)

The Court did not suggest, nor has it suggested in subsequent holdings, that the right of a defendant to testify is less basic in criminal prosecutions than in contempt cases; indeed, one would suppose, *a fortiori*, the converse to be true.

As was said in *Snyder* v. *Massachusetts*, 291 U. S. 97, 116, "A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, however convincing the ex parte showing."

This Court, commenting on the federal statute permitting a defendant to testify, said in *Wilson* v. *United State*, 149 U. S. 60, 65-66, that the common law prohibition against such testimony by the accused "in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he could readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. * * * In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established."

In *Eyer* v. *Brady*, 128 F. 2d 1012, 1014 (C. C. A. 4, 1942), cert. den. 317 U. S. 679, it was assumed, without deciding, that in the present state of the law in the United States a refusal to permit a defendant to testify under oath in a State prosecution would constitute a deprivation of due process under the Fourteenth Amendment justifying his release by a federal court on habeas corpus.

As stated in 58 Am. Jur., Witnesses § 173, "A constitutional provision conferring upon an accused the right to be heard in his own behalf is to be construed in its broadest sense in his favor. It * * * includes the right to take the stand as a witness, to be sworn and to testify".

In any event, the State having enacted a constitutional provision as well as a statute purportedly giving a right to all persons equally cannot administer and interpret them in such a fashion as to exclude the sick from their benefits without making that invidious and irrational distinction between the rights of the sick and those of the well, which was held in *Griffin* v. *Illinois*, 351 U. S. 12 to be a denial of equal protection and due process when made between the impoverished and those with money.

In *Griffin* v. *Illinois*, *supra*, it was held that although a State was not required by the Federal Constitution to provide a right to appellate review, nevertheless if it did, it could not do it in such a way as to deny review to those too poor to buy a stenographic transcript, without violating both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It was said that there was no distinction between such a law and one which would deny to those unable to pay court costs the "right to defend themselves in a trial court", and that "Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor." So also *Eskridge* v. *Washington State Board*, 357 U. S. 214.

One poor in health is not now given a fair trial if he is made to defend without the benefit of his own testimony,

when that right is accorded to the fortunate healthy. Such a trial is a mockery. *People* v. *Berling*, 115 Cal. App. 2d 255, 251 P. 2d 1017. It differs only in degree from trying a person while insane, which would violate the Fourteenth Amendment. *Massey* v. *Moore*, 348 U. S. 105, 108.

The trial court (p. 6, *supra*) expressed the view that one could properly be tried, assuming he was able "to stand trial", even though he was unable to testify because it would endanger his life. It commented on the fact that the certificates of Drs. Wolins and Stein did not say that petitioner could not stand trial, but only that he could not testify. Similarly the initial reports (see pp. 8-9, *supra*) rendered by Drs. Duryee and Denker, while stating unequivocally that it would be hazardous to his life for petitioner to testify, said only with regard to "standing trial" without testifying that that would be "probably also dangerous * * * if he is put under emotional stress and strain". And both, in their supplemental reports (pp. 10-11, *supra*) to the trial court emphasized the greater danger involved in testifying.

The rationale of the trial court's determination to continue the trial in the face of these uncontradicted reports was evidently that, so long as petitioner could understand the testimony against him and confer with counsel, it was inconsequential that the condition of his health would prevent him from making a defense by proffering his own testimony. The trial court believed, as it said (p. 6, *supra*), that nothing short of a finding that the petitioner was insane would necessitate a mistrial.

Since the Court of Appeals and the Appellate Division rendered no opinions in this case, their reasons for affirm-

ing the judgment cannot be determined. However in its opinion rendered in a collateral proceeding brought toward the close of the trial in which petitioner sought to prohibit the trial judge from proceeding further with the trial (see footnote p. 12, *supra*, and Appendix D, *infra*), the Appellate Division considered it relevant to comment that "No evidence was adduced that petitioner's condition would improve in the future."

This indicates a belief by that court that if a sick defendant does not demonstrate that he will be well enough to testify at some time in the future, he might as well be tried forthwith, despite his inability to defend himself, apparently on the principle that half a trial is better than none.

This notion was rejected by the Supreme Court of Mississippi in *Eastland* v. *State*, 223 Miss. 195, 78 So. (2d) 127. In that case four physicians certified that the defendant who suffered from heart disease could not undergo the ordeal of testifying in his own behalf without great risk and danger to his life. The trial court denied the application for a continuance, arguing that there was no indication that the accused would be any better at a later time. The Supreme Court of Mississippi, in reversing, held that whether or not the accused will be better able to undergo trial at a later date is not the test as to whether he is entitled to a continuance, any more than that would be the test in the case of an insane person. It held that in the circumstances, denial of a continuance deprived him of his constitutional rights, observing that while it was true that he was present at the trial "he may as well have been absent."

2. The prejudicial remarks of the Trial Court made in the presence of the local press as to collateral matters, inadmissible as evidence, with knowledge that his remarks would be published and likely to be read by the jury, deprived petitioner of a fair trial in violation of the XIV Amendment. This gratuitous, wholly unexpected and unnecessary denunciation is a startling revelation of the extent of the Court's bias against petitioner and is replete with intemperate statements, as well as admissions of conduct and mental operations unusual in a judge presiding at a criminal trial.

The trial was conducted at Riverhead, Long Island, in Suffolk County. Its two local newspapers, Newsday and Long Island Daily Press, were widely read and they had extensively covered the evidence with all the partisan feeling that such a situation engenders in a small community. Indeed, when the jury was empanelled, virtually all of the jurors admitted that they had read about the case, many of them specifically in the local newspapers, such as Newsday and Long Island Daily Press (Tr. of typewritten minutes, pages 1-900). Virtually all of them likewise had heard it discussed over the local radio. Of the twelve jurors finally selected, only the foreman stated he had not read about the case in the papers (537)* The remaining eleven jurors had read about it extensively (212, 262, 47, 767, 775, 55, 344, 369-370, 771, 777, 232, 383, 703, 715, 379, 550, 568).*

Faced with such conditions, the Trial Court, at the very least, should have instructed the jury not to read the newspaper reports nor listen to radio reports of the case. But, on the contrary, he stated (R 367):

---

* From typewritten minutes.

> "I am not going to be so unrealistic as to forbid you to read newspapers. That is utterly ridiculous. I am relying upon your integrity and instructing you that whatever you may see or hear anywhere else by inadvertence or otherwise should, to use a very popular expression, roll right off your back and not have any impression upon you whatsoever."

In this regard, the Trial Court took his first erroneous step in failing to assure the petitioner of a fair trial. Such action on his part is to be contrasted and condemned by what the Court of Appeals in the District of Columbia said in *Coppedge v. United States*, 272 F. 2d 504 (1959) at page 507:

> "Under modern conditions juries are customarily permitted to separate, even over weekends, and, unless there be exceptional circumstances, they should be permitted to do so. Of course newspapers carry articles about public trials of sensational interest, and of course those accounts may, and frequently do, carry statements of facts totally outside the evidence being produced in the courtroom. Our newspapers have complete rights to publish such accounts and such additional facts. *But it is essential to a fair trial of a defendant that the jurors should not know the contents of, lest they take account of, such newspaper stories. In order to protect, so far as possible, this essential right of a defendant, we have required that trial courts call the attention of jurors specifically to the possibility of such newspaper accounts and to admonish jurors not to read them.* This has been the rule for the past twenty years, or longer, and this is at least the third time we have emphasized it. What is said here applies with equal force to radio news broadcasts or telecasts." (emphasis added)

In a local atmosphere of ferment where strong public feeling was fanned by extensive partisan publicity, the Trial Court's permission for the jury to read the newspapers about the case was an open invitation to read and be infected with matters which should not have come to their attention. Instead of taking the precautions needed under the circumstances to insure petitioner a fair and unbiased trial, this privilege to the jury succeeded in doing the reverse.

Having sanctioned the reading of newspaper accounts of the trial, it was more than ever the duty of the Trial Court to see that his own prejudicial opinions were kept from the jury through the media of the press and radio. He not only failed to do so, but what is more remarkable, he made his remarks with a full realization that he anticipated there might be publicity to the incident (R. 1614) and he knew the press were in the courtroom (R 1616). Under these circumstances, with the press in the courtroom, the reasonable likelihood that the jurors would read and hear his remarks was just as real as if the Trial Court's denunciation of the petitioner had been made to the jury directly.

When called to his attention by the motion for a mistrial, the Trial Court assumed that the jurors had read the articles and heard the radio, for he denied the motion simply on the ground that he had previously warned them not to be influenced, except by what they heard in the courtroom (R 1615).

In *People* v. *Murawski*, 394 Ill. 236, 68 N. E. 2d 272, 1946 and in Sollars v. State, 316 P. 2d 917 (Nev.), 1957, communications to the jury were inferred, where under circum-

stances, similar to the instant case, trials were conducted in small communities and it was reasonable to believe that the jurors read the newspaper publicity, which was prejudicial to the defendants' right to a fair trial. But in neither of these cases was it the conduct of the Trial Court which caused the publicity and which made it more grievous and damaging to the petitioner. Here, as in *Briggs* v. *United States*, 6C, 221 F. 2d 636, 1955 the unfavorable publicity was created by the Judge's own acts. Just as in *People* v. *Duncan*, 350 P. 2d 103 (Cal.), 1960, cert. granted by this Court 1075 Misc. on June 27, 1960, in *Shepherd* v. *State of Florida*, 341 U. S. 50, 70 S. Ct. 549, 95 L. Ed. 740, and in *Griffin* v. *United States*, 3C, 295 F. 437, the publications were caused by improper action of government officers. By virtue of the Judge's own conduct, petitioner was publicly stigmatized in the midst of the trial as one who in the Judge's opinion did not consider him bound by the laws that applied to other people, who was a fraud, who was trying to make a fool of the court, and who had reckless disregard for the rights of the other people in the community.

Moreover, the Trial Court did not make the slightest effort to determine whether the jurors read the articles and whether they may have become infected with the virus of bias from the articles and the radio broadcasts. Under similar circumstances, the Court of Appeals in *Briggs* v. *United States*, *supra*, impliedly placed such an obligation on the Trial Court when it said on page 639:

> "In the present case no attempt was made to ascertain whether any juror had read the articles."

The Circuit Court in *Briggs* v. *United States* furthermore brushed aside the contention made by the government

that there was no direct evidence in the case that the newspaper articles were read by any juror. The Court indicated that it was idle to say that there was no direct evidence to show that the jury read the articles when it was clear that they had appeared in leading journals and scattered broadcasts over the community. But what seemed to influence the Court greatly was the fact that it was the Judge himself who had created the publicity and that in his position his published opinion would have greater weight on the jury. Thus, the Court stated at p. 639:

> "Such juror could hardly fail to be impressed by this expression on the part of the judge of his opinion about the testimony favorable to appellant on the part of these two witnesses. It strongly suggested to such juror that such testimony was the result of improper conduct on the part of appellant, which, however, the evidence failed to show. As said by Chief Justice Hughes in *Quercia v. United States*, 289 U. S. 466, at page 470, 53 S. Ct. 698, at page 699, 77 L. Ed. 1321: 'The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be onesided'; that 'deductions and theories not warranted by the evidence should be studiously avoided'. This court has heretofore held that such publicity under similar circumstances was prejudicial to a defendant and necessitated a new trial."

Cf. *United States* v. *Powell*, 171 F. 2d 202 (D. C. Cal.), where the Trial Court granted a mistrial because the newspapers attributed to the Judge an opinion he gave on the admissibility of evidence which prejudiced the defendant, although there was no evidence that the jury had read it. Also, *Marshall* v. *United States*, 360 U. S. 310, 79 S. Ct. 1171.

Equally improper and prejudicial was the method by which the Trial Court conducted an *ex parte* investigation of petitioner Glass' conduct and, in the role of witness or acting, as a prosecuting attorney, adjudged the petitioner publicly to be guilty of lies, fraud, misrepresentation and unlawful conduct, without any opportunity for petitioner Glass to defend himself. Such an *ex parte* investigation by the Trial Court was condemned in *Gordon* v. *United States*, 6C, 178 F. 2d 896, 900-902. It required a reversal of the conviction in *People* v. *McGeoghegan*, 325 Ill. 337, 156 N. E. 378, 385, 1927. In *Williams* v. *People of the State of New York*, 337 U. S. 241, 69 S. Ct. 1079, this Court indicated that *ex parte* action on the part of a Trial Judge when applied to the trial procedure as distinguished from the procedure on sentence after conviction, might well constitute a violation of the due process clause under the 14th Amendment.

The affirmance of the conviction by the Court of Appeals of the State of New York is an approval of the actions of the Trial Court which amounted to a flagrant disregard of the fundamental concepts of a fair trial guaranteed by the 14th Amendment to the Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

LOUIS BENDER
MOSES KOVE
170 Broadway
Counsel for Petitioner

July 25, 1960.

APPENDIX A

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of April in the year of our Lord one thousand nine hundred and sixty, before the Judges of said Court.

Witness:

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur

April 28, 1960

THE PEOPLE &c.,
Respondent.

—vs.—

JOHN A. BRITTING and ALBERT G. GLASS,
Appellants.

BE IT REMEMBERED, That on the 17th day of March in the year of Our Lord one thousand nine hundred and sixty,

John A. Britting and Albert G. Glass, the appellants in this cause, came here into the Court of Appeals, by James D. C. Murray, and Wegman, Epstein & Burke, their respective attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgments of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Harris B. Steinberg, of counsel for the appellant Britting, and by Mr. Richard J. Burke, of counsel for the appellant Glass, and by Mr. Jérome C. Ditore, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are modified in accordance with the memorandum herein and, as so modified, affirmed.

> Memorandum: "The proof in this case sustains the judgment of conviction on one count against both defendants for the crime of conspiracy in violation of § 580, subd. 6, of the Penal Law. It also sustains the conviction of both defendants on nine counts for the crimes of giving and taking bribes in violation of §§ 1822 and 1823 of the Penal Law. However, on this record, the charges against the defendant Britting on nine counts of taking unlawful fees (Penal Law, § 1826) and on five counts for taking illegal fees (Penal Law § 855) were merged in the charges

of Bribery involving identical facts. In reality they amounted to duplicate convictions for the same offenses and, as such, they are reversed and the counts dismissed. As thus modified, the judgments of conviction should be affirmed."

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be modified &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 28, 1960.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

APPENDIX B

STATE OF NEW YORK

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the nineteenth day of May, A. D. 1960.

Present:

Hon. Charles S. Desmond,
Chief Judge, presiding.

No. 325.

The People &c.,

Respondent,

—vs.—

John A. Britting and Albert G. Glass,

Appellants

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant Albert G. Glass herein and papers having been submitted thereupon and due deliberation having been thereupon had:

Ordered, that the said motion be and the same hereby is granted. Return of the remittitur requested, and when

returned, it will be amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the denial of the motions of the defendant Glass made during trial for a mistrial and a severance upon the ground that he was then unable to testify in his own defense because of his physical condition violated his rights to due process of law and the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. This Court held that the rights of the defendant Glass under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

And the Supreme Court of Suffolk County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball
Deputy Clerk

(Seal)

APPENDIX C

Penal Law (McKinney's Consolidated Laws of New York, Book 39, Part 2) *Sec. 1822. Giving or offering bribes.*

> "A person who gives or offers a bribe to any executive officer, or to a person elected or appointed to become an executive officer, of this state with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or by both."

Penal Law (McKinney's Consolidated Laws of New York, Book 39, Part 1) *Sec. 580. Definition and punishment of conspiracy.*

> "If two or more persons conspire: * * *
>
> 6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,
>
> Each of them is guilty of a misdemeanor."

APPENDIX D

In the Matter of Albert G. Glass, Petitioner, against Arthur Markewich, as Justice of the Supreme Court, et al., Respondents. Application, pursuant to article 78 of the Civil Practice Act, for an order prohibiting respondents from proceeding further with petitioner's trial in the Supreme Court, Suffolk County, Extraordinary Term, under an indictment accusing him of conspiracy and violation of section 1822 of the Penal Law, denied, without costs. No answer has been served by respondent Rigney, although he has submitted an affidavit and excerpts from the minutes of petitioner's trial in opposition to the application. A motion to dismiss has been made on behalf of respondent, Mr. Justice Markewich, pursuant to section 1293 of the Civil Practice Act, but no request has been made for permission to serve an answer, if the motion is denied. We assume therefore that it is the desire of the parties that a determination be made on the basis of the papers submitted. The petition states that the trial has now been proceeding since April 21, 1958, and that motions for a severance (a codefendant is also on trial) and for a mistrial have been made and denied. Petitioner has been informed by physicians whom he consulted that continuance of the trial would be dangerous to his health and life, and physicians consulted by the court have likewise reported that it would be dangerous for petitioner to testify in court and probably also dangerous for him to appear in court if he is put under emotional stress and strain. No evidence was adduced that petitioner's condition would improve in the future. The petition also states that petitioner has been advised by his attorney that it will

be necessary for him to testify, that he has a constitutional and statutory right to testify, and that he must now risk his life or risk the loss of a constitutional right by failure to be present in court to assist in and present his defense. On argument, however, we have been informed that the trial is now completed insofar as the introduction of evidence is concerned, and that petitioner has not been called to the stand. Apparently, in denying petitioner's motions, Mr. Justice Markewich was influenced to a considerable extent by activities on the part of petitioner which had come to his attention and statements theretofore made by petitioner which were inconsistent with his present claim, and with the history of his ailment which petitioner had presumably given to one of the physicians who reported his condition to the court. Apparently, also, such precautions as have been recommended for petitioner's safety, short of discontinuance of the trial, have been taken and will continue to be taken, and it now appears to be possible, in view of the present status of the trial, to take additional precautions (see *People* v. *La Barbera*, 274 N. Y. 339; *People* v. *Winship*, 309 N. Y. 311, 313, 314). Determination as to what course should be followed under the circumstances involves a grave responsibility, but the matter is one which rests at present at least within the discretion of the trial court. We are unable to say on the record presented that the court is acting or will act without or in excess of jurisdiction. Motion to dismiss petition denied, without costs. Present—Nolan, *P.J.*, Beldock, Ughetta, Hallinan and Kleinfeld, *JJ.*

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 267

ALBERT G. GLASS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWYN SILBERLING,
Special Assistant Attorney General for the State of New York in Charge of the Suffolk County Investigation,
47 E. Main Street,
Riverhead, N. Y.

JEROME C. DITORE,
Special Assistant Attorney General,
Of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
STATEMENT	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	14
POINT I—Petitioner's rights under the Fourteenth Amendment of the Constitution of the United States were not violated by the trial court's exercise of discretion in denying petitioner's motions for severance and mistrial which were based upon petitioner's alleged inability to testify in his own defense because of his physical condition	14
POINT II—Petitioner's second question and argument as to the prejudicial conduct and remarks by the trial judge, and the alleged publicity thereon is not properly preserved for review before this Tribunal	23
CONCLUSION	25

CASES CITED

Application of Albert G. Glass v. Arthur Markowich, 6 App. Div. (2d) 793, 175 N.Y.S. (2d) 332	8, 20
Clark v. Delaware & H. & R. Corporation, 245 App. Div. 447, 283 N.Y.S. 739	16
Cornell v. Green, 163 U. S. 76, 77	25
Cwach v. United States, 212 Fed. (2d) 320	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 267

ALBERT G. GLASS,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a review of a judgment of the Court of Appeals of the State of New York rendered April 28, 1960, unanimously affirming the conviction of petitioner for the Crimes of Bribery and Conspiracy.

Questions Presented

1. Did the Trial Court abuse its discretion in denying motions for a mistrial and severance, made by petitioner during the trial upon the ground he was then unable to testify in his own defense because of his physical condi-

tion, and thereby, did the Trial Court violate petitioner's rights under the XIVth Amendment of the Constitution of the United States?

2. Is the contention urged in petitioner's second question properly preserved for review in this Court?

Statement of Case

The indictment against petitioner arose out of an investigation conducted by a Grand Jury of Suffolk County, State of New York, concerning corruption in said County government. As a result of that investigation, petitioner was indicted for the Crimes of Conspiracy and Bribery. He was found guilty of these crimes by a trial jury and his conviction was unanimously upheld by an intermediate appellate court and by the Court of Appeals of New York State.

The first question raised by petitioner herein, does not bear upon the merits or the issues involved in his conviction. It bears solely upon the exercise of discretion on the part of the trial court in denying petitioner's various motions for a severance and a mistrial due to his alleged physical condition.

The record discloses that the petitioner Glass, from the latter part of 1955, to his sentence in 1958, raised his physical ailment as an attempt to avoid that stage of the investigation or trial in which he found himself.

It was not until the People's case in said trial, was coming to a close that petitioner, for the first time, raised his alleged ailment as a bar to testifying in his own defense. Prior to that time his position was that he could not stand trial, and prior thereto, that he was unable to appear before the Commissioner of Investigation of the State of New York (R. 250, 251-252).* Petitioner offered in evidence

* References are to pages of the printed Record.

at his trial, certain medical reports from doctors who described his heart condition. These reports were submitted to the Court initially, in connection with an application to punish petitioner for contempt, for disobedience of a subpoena issued by the Commissioner of Investigation of the State of New York in 1956 (R. 97; Def's. Exhs. A through D, R. 2184-2201, 248-251).

Doctor Master's letter, dated June 14, 1956 (Def's. Exh. D, R. 2200, 251), states in part:

> ". . . I feel that if the patient does not become exasperated and is not questioned to the point where he becomes tired or excited, that he could be questioned. While talking to the patient in my office, he became emotional and wept. He was sure he could not stand being 'badgered'. As a matter of fact, Mr. Glass is very nervous and this may prove more of a difficulty than the physical status of the patient. However, as I say, if he is examined, and the interrogations are curtailed if the patient reacts poorly to them, I think he could testify".

In November 1957, a motion was made by the petitioner for a severance (R. 92-103, 251). The above mentioned exhibits (Def's. Exhs. A-D) were given to the Court at that time (R. 97, 98) and, in addition, a further medical report dated October 1957, from a Doctor Maynard (Def's. Exh. E, R. 104-107, 252). Said report stated (R. 106):

> "Because of the fact that Mr. Glass is acutely ill he is not in satisfactory condition to stand trial at present. It will probably take at least two weeks before he recovers from the present acute illness. If he returns to the state of health in which he was before the recent acute illness it is my opinion that he cannot stand trial without undue risk unless the court can make arrangements so that Mr. Glass can have rest periods if required during the proceedings and have

an opportunity to take medication for chest pain when and if it occurs."

The motion for a severance at that time, was denied (R. 251).

On the third day of petitioner's trial, while the jury was being selected (April 24, 1958), Glass made a similar motion for a severance based on his past medical history and exhibits (R. 247-253). Another letter from a Doctor Wolins to Judge Markewich (the trial judge), (Def's. Exh. F, R. 2202-2204, 253) was also submitted to the Court on this motion (R. 268). This motion was denied. Doctor Wolins' letter stated in part (R. 2203):

"Under such circumstances, it would seem only right (inasmuch as Mr. Glass both by his own statement and by his behavior does not seem to wish to avoid appearing in court), that in fairness to Mr. Glass due consideration be given to his physical incapacity. I would suggest first that sessions be relatively short, and that he be given the privilege of interrupting the sessions at any time at which episodes of pain occur. At these times, in addition, he be permitted to show a preference for continuing the session if his pain subsides with medication, or discontinuing the session until several hours later or the following day. If this procedure is not followed, there is a distinct possibility that Mr. Glass' health, or even his life, may be endangered by the procedures of the courtroom".

The court stated that from personal observations of its own, prior to this motion for a severance (R. 262), Glass' conduct was inconsistent with his duty and responsibility to conserve his health (R. 262-266, 267-268, 270-273).

On May 13, 1958, as the People's case was coming to a close, petitioner renewed his application for a severance on the grounds that to testify on his own behalf would put

an undue strain on his heart and endanger his life (R. 1134-1136).

At this time and in support of this motion, an additional letter from Dr. Wolins and one from a Dr. Stein, both dated May 12, 1948, were admitted into evidence as Defendant's Exhibits F1 and F2 (R. 2204, 2205, 1136).

Dr. Wolins' letter stated (R. 2204):

> "In my opinion the physical condition of Mr. Albert Glass is such that testifying on a witness stand may endanger his life".

Dr. Stein's letter stated (R. 2205):

> "I believe that an extreme 'excitable' state is very dangerous for him and have advised him that under these circumstances it would endanger his life to testify".

The trial court stated at this time (R. 1142-1144):

> "Now, I don't know just where you draw the line in a situation like this. It is impossible even for members of the medical profession to draw the line between what is physical and what is emotional. Those things which we call psychosomatic are just as real, even though emotionally induced, as if they were the result of a physical trauma, and I suppose there is a question as to how far what we may call a self-induced state of illness can be availed of by one having to undergo an unpleasant experience in attempting to release himself from the necessity of undergoing that experience.
>
> My job is not made any easier by the fact that, as I mentioned at some length at various other proceedings similar to this one, I have had Mr. Glass practically thrust under my nose outside of the courtroom, without any fault of his or mine; as I indicated; there is a limited sphere in which we can both exist in this

community in these circumstances. Last week, for instance—and this was not of my seeking, and I know definitely it was not of his seeking—but circumstances required that I occupy a room right next door to him at the hotel, and of course, in my comings and goings from the courthouse and from the hotel, I have run into him continually and I had had occasion to observe him and to some extent I have put the things which I have observed on the record, and I have observed other things.

Of course, I am no doctor. I can say that there are things which I have observed which just don't jibe with the sort of thing that I have heard here, and yet they do, in taking into consideration the fact that Mr. Glass apparently is the sort of person who doesn't observe precautions, and as I indicated on a previous occasion, I don't know where the limits lies between his responsibility and the Court's responsibility for his physical condition and the consequences of his acts. I have said before that if he doesn't look after himself outside the courtroom, I don't know how far my responsibility goes inside the courtroom.

Now, for instance, one thing that is very strange is this: I have never heard of a man afflicted with coronary disease who is permitted to smoke, and I have observed him smoking on all sorts of occasions. I have observed a change in his attitude, in his appearance, in his posture, at times when he should have had reason to believe he was not under observation, changing almost immediately as it became apparent that somebody was there who could see him, namely myself. I am not imagining these things: these are things that I have seen".

The court then arranged to have Glass examined by a physician selected by the New York County Medical Association (R. 1150-1151, 1153).

The court reserved decision on this renewed motion for severance (R. 1153) and recessed the case until May 19, 1958, in order to allow Glass, time to be examined by the physicians to be selected in the manner above described (R. 1274-1275).

As a result of the above examination of the petitioner, letters from two physicians who had examined him were received into evidence as Court's Exhibits 2 and 3 (R. 2213-2217, 2218-2220, 1277, 1278).

In addition, supplementary letters from these two physicians stated that a greater burden would be put on Glass' circulation if he took the stand than if he remained seated without testifying (Court's Exhibits 6 and 7, R. 2225-2227, 1278, 1279).

The court reserved decision on this motion for severance, stating that it was still under consideration, it being a matter for its discretion and conscience (R. 1279).

The Court, on May 20, 1958, denied Glass' application for a severance stating (R. 1421-1422):

> "On the basis of what is before me at this time, cumulatively up to this point inclusive of the reports which have been marked into evidence as defendant's exhibits and Court's exhibits, and inclusive of my own observations, I am not persuaded at this time that the interests of justice require a severance with respect to the defendant Glass. As far as I have been able to observe, there is no more reason for such a severance than existed last week or the week before. His conduct, such as I have been able to observe, has been the same as it was last week and the week before, without the necessity of my going into detail.
>
> There has been no doctor in attendance, and Mrs. Glass, in fact, was not in the courtroom this morning, which may possibly have been the result of the fact

that counsel admonished her for her conduct yesterday afternoon, which was called to everybody's attention during the course of a conference at the bench and which consisted of yawning rather loudly and in a disturbing manner.

Regardless of what may be anybody else's duty or concern to do with respect to the case, the responsibility for this decision is peculiarly mine, and it is a matter for my discretion and for my conscience, and that is the way I feel about the situation at this moment.

The motion is denied as of this time, with, of course, an appropriate exception to the defendant."

Almost all the reports from the doctors, submitted as exhibits in this case, stated that certain safeguards be used if Glass' case was to continue.

The Court at all times made these safeguards available to the petitioner Glass.

On May 21, 1958, Glass petitioned the Appellate Division, Second Department, in an Article 78 proceeding, for an order of prohibition to halt the trial. This application was heard on May 29, 1958. (Application of *Albert G. Glass* v. *Arthur Markewich*, 6 App. Div. 2d 793, 175 N.Y.S. 2nd 332.)

The Appellate Division denied Glass' application.

On May 22nd, in the absence of the jury, the court indicated that certain activities of Glass, appear to be inconsistent with his claim of being a very sick man and inconsistent with the duty and responsibility of care he owed himself (R. 1515-1522). The court realizing the great responsibility it had in this matter, because of the motions addressed to its discretion, inquired of the Bureau of Motor Vehicles as to an application made by Glass for a license (R. 1521-1523).

An application dated October 10, 1955, part of the Court's Exhibit 8 (R. 1523), indicated that Glass, at that time, stated on this application that he had a moderate heart ailment in December, 1954, but was fully recovered and attending to normal duties for many months (R. 1525). Dr. Duryee's report (Court's Exhibit 2) indicates that Glass told him that he had an attack in December 1954, and while in the hospital in February, 1955, he had a second attack and never returned to work since that time (R. 1525-1526).

In September, 1957, when Glass made a further application for a duplicate license, he stated on said application that he suffered no physical disability from which he has not completely recovered (R. 1526).

The Court remarked as to this inconsistency between the petitioner's application for a license and what he told his doctor (R. 1526-1527, 1529-1530, 1530-1532).

> "I don't know what the explanation is and I don't care. I know that at the very least this indicates a reckless disregard for himself. I have no intention of being made a fool of by Mr. Glass or anyone else. This should be indicative of what my disposition would be in the event that any further motion is made in this case for severance.
>
> I haven't any doubt, as I indicated, that this man is ill. I intend to pursue the schedule of time which has been pursued up to now, but in face of what I have seen here and in the face of what appears by this exhibit, I think that my duty is clear with respect to this, and I am not entirely certain whether or not what has happened here is not contemptuous of the Court, but in any event there is no point that I can see in pursuing any such proceeding. I don't know whether any counsel has anything to say in addition to what I

have just stated but if there is for the record, you may. (R. 1526-1527)*

* * * * *

". . . What I had to say was attributable to the man only, and I think that the Court has a right to be outraged when one makes the kind of inconsistent statements that he did and urges his condition upon the Court.

The damage that has been done is that while it may be true that his condition may have been whatever it was at some time in the past, and that what he did in 1955, in October of that year, and in September of 1957 in making his statements to the Motor Vehicle Bureau, there was a gross inconsistency between those statements and the ones that he made to Dr. Duryee. He either lied then, or he lied now to Dr. Duryee, one or the other; I don't know which.

As a matter of fact, he either lied in 1955 or in the 1957 statement to the Motor Vehicle Bureau; I don't know which, because the two are inconsistent." (R. 1529-1530.)

* * * * *

"The Court: I don't want to be found wrong either, but I say to you that a large portion of Dr. Duryee's opinion was based upon what the man told him as to what had happened to him, and apparently he has no

---

*At the trial Glass' counsel disclosed complete agreement with the Court and affirmed their belief in the Court's sincerity and good conscience in making the rulings as to the motions for mistrial and severance (R. 1527):

"Mr. Smith: We, of course, did not know anything about what was just put upon the record. We have observed him in the office. He is a strange man, as you know, from your experience with him for these weeks and our experience with him for months. We did not realize the enormity of his physical problem, which to a certain extent is connected with an emotional problem, until the coming in of the reports to which you have made reference. We haven't the slightest doubt of your sincerity in making a ruling, nor that you have searched your conscience in making the ruling." (R. 1527)

compunction about telling the doctor that he never returned to work after February, 1955, because that serves his purpose there, whereas he has no compunction about telling the Motor Vehicle Bureau in 1955 and 1957 that he is perfectly all right and that he has returned to work, because that serves his purpose then in getting a license, and if the man chooses to drive a motor vehicle around, whether with one license plate or two, or six, I don't care about that either.

But I am concerned, as a member of the community, if, being as sick as he says he is, he has a license, and if he is as sick as he says he is, he is using it fraudulently, he drives that Cadillac around himself, and constitutes himself a danger to the community in reckless disregard of other people.

Now, I have said all that I am going to say about this subject, except for one thing. I have in mind that Dr. Denker very eloquently—this was the neuropsychiatrist—finished his letter with a quotation from Dr. John Hunter and as he puts it, when suffering from angina pectoris he put his situation very neatly by stating 'My life is at the mercy of any scoundrel who cares to excite me.'

I am not the scoundrel who cares to excite Mr. Glass. I am doing everything I can to avoid that. But if Mr. Glass chooses to excite Mr. Glass in his own way, I can't help it." (R. 1530-1532)

The appellant Glass at the time the defense rested, renewed his motion for a severence and mistrial on the same grounds urged on prior motions (R. 1786). This motion was again renewed in conjunction with a motion to set aside the verdict (R. 2073); and petitioner then raised for the first time, the federal question. These motions were denied (R. 1787, 2074).

At the time of Glass' sentence, two additional medical reports, Court's Exhibits 9 and 10 (R. 2228-2237, 2072-

2073), were received. These reports stated that Glass' health and life would be jeopardized if he were to be imprisoned.

The Court, before suspending the execution of the prison sentence given petitioner, upon certain conditions (R. 2126-2127), stated (R. 2122-2125):

> "I get down to this, that this man has been convicted of a serious crime. What he did was against the law, no question about that. What he did was reprehensible, no question about that. But I am faced with the proposition that this is a very sick man. Court's Exhibits 9 and 10 in evidence, placed into the record after the conviction, are the reports of Doctor Wright and Doctor Heller, and they indicate without doubt that to confine this defendant in prison might very well have extremely serious consequences. Now, although I am charged with the duty of pronouncing the ultimate judgment upon this defendant as far as this case is concerned, the law does not make me his executioner, and I have no intention of acting as such. I cannot fly in the face of these medical reports. I cannot send this man to prison and I will not send him to prison—let us understand that at the outset—because I am not going to be placed in the position of flouting the reports of competent medical men.
>
> However, by the same token, I cannot permit this man to continue the activities which he has carried on, for two reasons: In the first place, I am informed by the medical men, and as counsel know, because it was arranged between them that this be done, I had a conference of over an hour's duration a couple of weeks ago with one of the doctors who made the reports that I referred to and went very thoroughly into this matter, and I am convinced of several things: In the first place, the type of activity that has been carried on is dangerous to this man's health; he can't carry it on. In the second place, they advised me that cessation of

such activity will have the effect of prolonging his life. In other words, both sides of the coin are true—to carry on the activity would be dangerous to him, and to cease it would be beneficial to him.

Now, I know that viewed as a cold proposition, to send him to prison and to direct that he be confined in the hospital in the prison sounds as if this would be the best way to look after him. I know that is not so, because psychologically it is untrue. There is that about confinement itself which would be dangerous to this man. Yet at the same time, to have no rein or restriction upon him whatsoever would be to place him in a position where he could make a mockery of justice by walking around with a suspended sentence and carrying on business activities and everything else while others convicted who do not have the ill of good fortune to be sick are confined in prison for other parts of the same transaction.

Now, the question may be asked where one draws the line between his being sick and being able to carry on the activity which he is carrying on. There is a very simple explanation, and I say that the medical man agrees with me with respect to this. At one time during the trial I observed that this defendant was carrying on certain activities which seemed to be completely inconsistent with his physical condition, and one of his then counsel remarked that it was very difficult to hold him under any restraint, and one thing led to another in our conversation and on the record there is a statement by me in which I invited an application to commit him for observation, but of course no such application was made.

The answer is that this man is driven, apparently—and I say this as a layman, and even one who is versed in this profession would tell you that the science of psychiatry is inexact with respect to the border line between one thing and another—but he appears to be driven by a neurosis, which is not the same as a psychosis. In other words, while this man may be

emotionally twisted so that it is very difficult to refrain from activity, it doesn't reach the stage of mental illness that would justify a commitment on any kind on that score, and that is what is understood by this, and therefore this is something that the man can consciously control, must consciously control. Now, how?

I intend that Albert Glass shall not go to prison, because as I indicated, the medical reports say he should not. However, I must keep him from the activities I have spoken of, for the two reasons that they are dangerous to him and apparently he does need a caretaker, and also because, as I indicated, it would make a mockery of justice. I can do this by placing the key to the jail in his hands, and his hands alone."

Respondent does not set forth a concise statement of the case, material to petitioner's second question. It is respondent's position that said question was not timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari (Revised Rules of the Supreme Court of the United States: Rule 23(f)).

This position will be fully discussed under Point II, *infra*, of the argument.

ARGUMENT

POINT I

Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were not violated by the trial court's exercise of discretion in denying petitioner's motions for severance and mistrial which were based upon petitioner's alleged inability to testify in his own defense because of his physical condition.

Petitioner's claim under his first question is posited upon an alleged abuse of discretion on the part of the trial

court in denying motions made by petitioner for severance and mistrial. These denials, petitioner contends, compelled him to proceed with his trial under adverse personal physical conditions, in violation of his rights under Federal and State Constitutions (R. 2073).

Petitioner devotes a considerable portion of his brief to cases, statutes and miscellaneous reference which underline the basic principle that a defendant cannot be denied the right to testify in his own behalf.

There is no question in this record that the State of New York affords to every defendant the right to testify in his own behalf without limitation or qualification. The federal claim preserved by petitioner is not based on the ground that the State of New York denied the petitioner his statutory and constitutional right to testify in his own behalf, even though petitioner attempts to inject this contention into his petition.

Petitioner always possessed the right to testify in his own behalf. It was never taken away from him.

The federal question passed upon by the Court of Appeals of the State of New York and urged by petitioner, was that he was unable to testify because of his physical condition. No question was preserved by petitioner, nor passed upon by the Court of Appeals of the State of New York, that petitioner was denied the right to testify.

Petitioner's claim throughout his trial and on his appeals was based on one ground and one only. A claim of abuse of discretion on the part of the trial court in denying motions for mistrial and severance based on petitioner being unable to stand trial and later, being unable to testify on his own defense.

It is a rule of law that the granting or denial of a motion of one defendant to sever his case, rests within the sound judicial discretion of the trial court and such discretion

will not be disturbed on appeal in the absence of a showing of clear abuse.

Cvach v. United States, 212 Fed. 2d 520;
People v. *Tabet*, 402 Ill. 93, 83 N. E. 2d 829, certiorari denied 336 U. S. 970, 69 S. Ct. 933;
People v. *Oskroba*, 305 N. Y. 113, 111 N. E. 2d 235; reargument denied 305 N. Y. 696, 112 N. E. 2d 778;
Clark v. *Delaware & H. & R. Corporation*, 245 App. Div. 447, 283 N. Y. S. 739.

The exercise of discretion—the asking of a favor from the court below—is not to be performed arbitrarily or clearly abused. If it is, it is subject to review, as a matter of law.

"Abuse of Discretion" means action which is arbitrary, fanciful or clearly unreasonable. It implies that the trial court with total disregard to the circumstances and facts at the time and without applying judicial reason and sound logic to said circumstances and facts, decides a matter entrusted solely to its discretion, whimsically, or arbitrarily and without the use of judicial reason.

It was stated by the Court of Appeals of the State of New York in *Livermore, et al.* v. *Bainbridge, et al.*, 56 N. Y. 72, 76, as to judicial discretion:

> "It does not aid the appellants to show that the order was not justified by the facts upon which it was based, or that the discretion of the court below in the particular case was improvidently exercised. It is not sufficient to show that injustice has been done, *but it must appear that it was done under circumstances which authorize this court to interfere.* The affidavits brought to the attention of the court a circumstance upon which, the claim of misconduct was made. The judge at Special Term was called upon to decide in

respect to it. From the nature of the case, what is misconduct on the part of a jury or referee, and what facts establish it, are inquiries which cannot ordinarily be determined by the application of exact rules of law, and *the decision must be left mainly to the good sense and sound judgment of the judge before whom the inquiry is originally prosecuted. Different minds may reach different conclusions upon the same facts, and it is not to be supposed, that a judge under the guise of discretion will seek to do injustice.*" (Emphasis supplied)

The record will reveal that the trial court did not abuse its discretion; that petitioner's motions were denied only after careful consideration of all the circumstances and facts within the court's knowledge and conscience. The trial court's reasons for denying petitioner's motions were set forth under the statement of the case, *supra*, with appropriate references to the record where such reasons could be found.

The record does not reveal that petitioner's condition was so serious that it was necessary to confine him to a hospital or to his own bed. There is no indication in the record that petitioner was restricted to a minimum freedom of movement; that he was prohibited from walking, even up and down stairs; that he was prohibited from smoking; that he was prohibited from operating a motor vehicle; that he was prohibited and forbidden freedom to engage in any outside activities, business, social or otherwise.

In short, even though he had a "heart condition", he was not immobilized because of any stresses or strains, physical or emotional, pleasant or unpleasant, which could and might increase injury to his heart and health and ultimately his life. Petitioner had as much freedom of action as anyone else. In fact, he had more.

This is not a situation in which petitioner was confined by medical authority, to a bed, either hospital or home and was forced by legal compulsion to leave that bed and appear in court.

Almost all the reports from the doctors, submitted as exhibits in this case, stated that certain safeguards be used if petitioner's case was to continue.

The court at all times made these safeguards available to the petitioner. Petitioner did not consider his condition so serious as to avail himself of these safeguards.

The trial court's imposition of conditions upon its suspension of petitioner's prison sentence were not solely imposed, as petitioner claims, because the Court was in complete agreement as to the gravity of his illness. The conditions were imposed because the type of activities carried on by petitioner were inconsistent with his claim of being physically unable to proceed with his trial or to testify in his own behalf. Certain of these conditions required that petitioner cease his real estate speculation activities and his operation of a car and motor boat.

Petitioner has maintained throughout various stages of the trial and prior thereto, that because of his heart ailment and neurotic and emotional disposition, his life was in constant danger of being destroyed at any time.

However, after the Court imposed the limitations and conditions upon petitioner's sentencing, petitioner put up quite a struggle to keep from surrendering his driver's license to the Court (R. 2131-2136).

Petitioner's argument was that "he had just received a new license from the Motor Vehicle Commissioner after a complete checkup and examination by the Motor Vehicle Commissioner and the submission of doctors' reports" (R. 2133).

These medical reports, ostensibly by some of the doctors whose reports are defendant's and Court's exhibits in this case (R. 2135), stated that the petitioner had "a type of heart disease which does not cause sudden termination, such as the type of heart disease which keeps a man from driving an automobile. This is a type that is not that immediate" (R. 2133-2134).

Petitioner lifts a portion of a statement of the trial court from its context and states it indicates that said Court would not declare a mistrial unless the petitioner was found insane (Petitioner's brief, p. 7).

A reading of the prior omitted portion of the Court's statement reveals that the Court is commenting upon the stress placed upon a neurotic who is faced with the reality of making a decision as to whether he will testify or not (R. 1146). It does not indicate that the Court would only grant a mistrial if the petitioner was found insane.

Petitioner further claims that the Appellate Courts having rendered no opinions, their reasons for unanimously affirming the conviction of petitioner cannot be determined. Implicit in the decisions of the Appellate Courts was the fact there was no abuse of discretion, as a matter of fact and law, on the part of the trial court and therefore, no denial of petitioner's rights.

In order to premise a claim that the Appellate Division of the Supreme Court of the State of New York espoused the proposition that "if a sick defendant does not demonstrate that he will be well enough to testify at sometime in the future, he might as well be tried forthwith . . . half a trial being better than none" (Petitioner's brief, p. 25), petitioner quotes a sentence from a decision of said Court

on a collateral proceeding,* brought by petitioner, wherein that Court stated "No evidence was adduced that petitioner's condiion would improve in the future".

A reading of said Court's decision which is attached as Appendix D to petitioner's brief, indicates without doubt, that said Court was to decide petitioner's application, in that proceeding, on the basis of the papers submitted to the Court; that the sentence extracted from its context and quoted by petitioner, for a purpose alien to the decision, indicates only the Court's comments as to what information the petitioner's papers so submited contained or did not contain. It does not indicate directly or indirectly that Court's or any other State Court's adherence to the proposition ascribed to it by petitioner.

Having erroneously arrived at said premise that an intermediate appellate court in this State, which ultimately passed upon petitioner's appeal, subscribes to the principle that a defendant too sick to undergo trial and who does not indicate he would be better at a later time, must stand trial forthwith, petitioner proceeds to state that such a principle was rejected in *Eastland* v. *State*, 223 Miss. 195, 78 So. (2d) 127.

In the *Eastland* case, the defendant was convicted of embezzlement. On appeal his conviction was reversed and the case remanded.

The defendant in said case had the following physical and mental disabilities:

1. He suffered from general arteriosclerosis which affected his heart and his brain;

2. He suffered repeated heart attacks;

3. He had gall stones;

---

* Application of *Albert G. Glass* v. *Arthur Markewich*, 6 App. Div. (2d) 793, 175 N.Y.S. (2d) 332.

4. He had suffered from cerebral thrombosis and angina pectoris;

5. He had a marked enlargement of the heart;

6. He had experienced congestive heart failure, a phase of heart disease;

7. The arteriselerotic condition was as extensive in his brain as it was in the other parts of his body.

8. His brain would not be supplied with the normal amount of fresh circulating blood that would be required under pressure during the ordeal of a trial;

9. He had suffered two paralytic strokes;

10. He had two hernias for which his physician had refrained from operating because of his heart condition, in the absence of which an operation would have been performed.

This defendant was confined either to his own or a hospital bed for at least twelve months prior to the trial. The defendant not only was unable to intelligently confer with his attorneys or prepare his defense, but, in fact, his doctor stopped his counsel from having a conference with him because he was unable to physically and mentally participate in such a conference.

Defendant's counsel, on advice of defendant's physician, refused to produce the defendant, who was confined to his bed, for trial.

The trial judge, thereupon ordered the sheriff to go to the home of the defendant and bring him to court in an ambulance, if necessary. He was brought to court by his family, accompanied by his physician, under compulsion and protest. The trial lasted four days, during which time the defendant was physically and mentally incapable of conferring with his attorney.

The trial court had overruled repeated motions for a continuance, on the ground that the defendant would not be in any better condition to undergo trial at a latter time.

On appeal, the Supreme Court of Mississippi, stated:

> "If we should approve the test followed at the trial as to the right of the prosecution to proceed with a trial, when the accused is physically and mentally unable to stand trial within the meaning of section 26 of the State constitution, then any invalid could be brought from his bed at home or in a hospital and be tried for crime where the state is able to show that his condition would likely never improve." (78 So. (2d) 127, 131)

A mere reading of this case indicates its complete lack of relationship to the instant case.

The trial court's ground for denying Glass' motions for a severance was not founded on the fact that Glass would never improve. Glass did not have the serious physical and mental disabilities that reduced the defendant in the *Eastland* case to a mere "shell of a man". Glass was not confined to his bed at home or in a hospital; Glass conferred without any trouble with his attorneys in and out of court, in the defense of his case and; he appeared before the Grand Jury without claiming any physical or mental disability to do so. None of the physicians in this record claimed that Glass could not do these things or confined him to a hospital or to his own bed or even attempteed to curtail his activities. None of the physicians in the *Eastland* case, as in the present case, stated that the defendant could stand trial or testify if certain safety precautions were followed.

If petitioner was in the same situation as the defendant in the *Eastland* case, there is no question that the trial court on the facts and circumstances of the *Eastland* case, would have granted petitioner's motion for a severance.

The Court's comment in the *Eastland* case, that the defendant although present at the trial, "may as well have been absent" pertained to his mental disability brought about by his physical disability, which rendered him devoid of any mental faculties and capabilities to understand what was going on. Petitioner does not claim he was lacking "a capable operating mind". In fact, the physicians who examined him found nothing wrong, in any way, with his mental processes.

We contend that there is no merit to appellant's argument and no showing, either affirmatively or otherwise, of any abuse of discretion on the part of the trial court, upon which a violation of petitioner's rights under the XIVth Amendment of the Constitution of the United States, can be based.

POINT II

Petitioner's second question and argument as to the prejudicial conduct and remarks by the trial judge and the alleged publicity thereon, is not properly preserved for review before this tribunal.

It is a well established principle of this Court that before it will review a decision of a State Court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that said State Court's decision of the federal question was necessary to its determination of the cause, *Honeyman* v. *Hanan*, 300 U. S. 14, 18; *Lynch* v. *New York*, 293 U. S. 52.

Petitioner states that "The additional ground asserted herein that petitioner was deprived of a fair trial *in violation of the XIVth Amendment* by the prejudicial conduct and remarks of the Trial Court publicized in the local newspapers and on the radio *was raised in the Trial Court by a motion for a mistrial (R. 1600, 1610) and in Pt. III of the*

brief submitted to the Court of Appeals of the State of New York". (Emphasis supplied.) (Petitioner's brief, pp. 2, 3).

The reference to the record cited by petitioner to establish the jurisdictional grounds for this Court to review, reveal only that petitioner moved for a mistrial on the basis of an alleged claim of actual bias on the part of the Trial Judge (R. 1000), and that newspaper and radio publicity created an atmosphere which was not conducive to a fair trial (R. 1610) (Petitioner's brief, pp. 2, 3). Nowhere does petitioner state, either at the places he cites, or elsewhere in the record, that his motion for a mistrial is based on a violation of the XIVth Amendment of the Constitution of the United States or on any other federal ground nor is this motion based on a violation of the Constitution of the State of New York.

Point III of petitioner's brief to the Court of Appeals of the State of New York does not raise, much less mention, a violation of the XIVth Amendment of the Constitution of the United States (Appellant's brief, Court of Appeals, State of New York, pp. 32-37). It is significant to note that Point II of petitioner's brief to said Court specifically raises with reference to petitioner's first ground here, a federal question (violation of the XIVth Amendment of the Constitution of the United States).

Petitioner did not consider this second ground of sufficient weight and importance to urge a violation of his rights under either the State or Federal Constitutions.

The fact that present counsel for petitioner were recently substituted does not, in any way, change the situation.

Even if counsel were substituted in time, to move to amend the remittitur of the Court of Appeals, of the State of New York, that motion would have been denied as no federal question was ever raised on the trial, in the intermediate appellate court or before the Court of Appeals of the State of New York. Said federal question could

not have been passed upon by said Court of Appeals, and the remittitur could not have been amended to indicate that such a non-existent federal question was passed upon.

As this Court stated in *Cornell* v. *Green*, 163 U. S. 76, 77:

> "The Constitution of the United States is not mentioned in the bill of Cornell, or in the demurrer of the defendant, or in the decree or the opinion of the Court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right. The first indication of anything like an intention on the part of the plaintiff to invoke the protection of the Constitution of the United States is in the suggestion, in the assignment of errors, 'that said finding deprived said complainant of his property without due process of law.'"

The second ground urged by petitioner is not properly the subject of review before this Court.

CONCLUSION

The petition should be denied.

Dated: Riverhead, New York, August 18, 1960.

Respectfully submitted,

Edwyn Silberling,
Special Assistant Attorney General
of the State of New York in Charge
of the Suffolk County Investigation.

Jerome C. Ditore,
Special Assistant Attorney General,
of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1960

No. 267

ALBERT G. GLASS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

LOUIS [illegible]ENDER
MOSES L. KOVE
Attorneys for Petitioner

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

IN THE

Supreme Court of the United States

October Term, 1960

No. 267

ALBERT G. GLASS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

Respondent asserts in its answering brief that this Court is without jurisdiction to review Point II of the petition for a writ of certiorari. In support of its position, respondent argues that petitioner did not literally use the words "violation of the XIV Amendment of the Constitution of the United States" in the trial court or in petitioner's brief on appeal (respondent's brief, p. 24). For this reason and no other; respondent concludes that no Federal constitutional question was raised upon which the Court of Appeals of the State of New York could have acted in reviewing the judgment of conviction below.

Respondent concedes that petitioner did move in the trial court for a mistrial on the basis of the bias of the trial judge, and for the further reason that prejudicial remarks on the part of the trial court deprived petitioner of a fair trial as the result of newspaper and radio pub-

licity during the trial (respondent's brief, p. 24). Respondent also concedes that petitioner did not withdraw or abandon these grounds, but asserted them in the Court of Appeals (respondent's brief, p. 24). Respondent might well have said that it was also asserted in the intermediate Appellate Court, that is, the Appellate Division of the State of New York, which it in fact was, as will be indicated hereinafter.

Because of petitioner's failure to add the words "in violation of the XIV Amendment to the claimed denial of a fair trial, the respondent, or prosecutor in this case, seeks to foreclose a review by this Court of a trial and conviction which violated the fundamental aspects of fairness in a State criminal prosecution.

It is respectfully submitted that respondent errs in its contentions as aforesaid. The jurisdiction of this Court does not depend upon the use of any particular form of words or phrases. *St. Louis I. M. & S. R. Co.* v. *Starbird*, 243 U. S. 592, 598; *Braniff Airways* v. *Nebraska State Board*, 347 U. S. 590, 598-599.

This Court has repeatedly held that if the record as a whole shows either expressly or by clear intendment that petitioner has brought to the attention of the State court a Federal claim and the grounds therefor, the claim will be regarded as having been adequately presented. *St. Louis I. M. & S. R. Co.* v. *Starbird*, *supra*; *Braniff Airways* v. *Nebraska State Board*, *supra*; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Stern and Gressman*, Supreme Court Practice, page 82 and cases cited.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an

absence of actual bias in the trial of cases." *In re Murchinson*, 349 U. S. 133, 136.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba* v. *California*, 314 U. S. 219, 236.

Such unfairness exists when "Newspapers . . . deprive accused persons of their right of a fair trial, *Shepherd* v. *State of Florida*, 341 U. S. 50, 52, particularly where the trial court generates the publicity and thereby makes known his biased and prejudicial opinions on a matter which should be kept from the jury. *Briggs* v. *United States*, 6th C., 221 F. 2d 636, 639.

It is thus fundamentally clear that a Federal constitutional right is violated where a trial judge, either through bias against a defendant or as a result of a total disregard of his fundamental rights to a fair and impartial trial before a jury, publicly stigmatizes the defendant in such a manner as to cause his remarks to be conveyed to the jury through the media of newspapers and radio. The denial of a fair trial under these circumstances is accordingly sufficient to raise a Federal question reviewable by this Court on a petition for a writ of certiorari as long as it has been specifically called to the attention of the trial court and passed upon without abandonment through the State courts.

The record below reveals without question that the trial court was apprised by petitioner's counsel of the asserted

denial of petitioner's right to a fair trial as a result of the prejudicial remarks of the trial court, communicated to the jury through the media of newspapers and radio.

> "The Court: . . . All right, you don't have to belabor this point. *What you are urging upon me is that the newspaper publicity and the radio publicity created an atmosphere in which you say that your client could not receive a fair trial;* is that what you are bringing home to me?
>
> "Mr. Smith: Two points, expressed bias—
>
> "The Court: I am now talking of the second aspect of your motion.
>
> "Mr. Smith: As to the second aspect, your Honor has stated it better than I can state it.
>
> "The Court: I doubt it.
>
> "Mr. Smith: That is exactly it, and along the first point, I would like to give you some citations.
>
> "The Court: As to the first point, I don't need any citations whatsoever, because it is a well settled matter of law that if the Court is biased, the Court should not preside at the trial of a particular defendant against whom there is such a bias. To cite cases for that proposition would be a waste of time. That is elementary.
>
> *As to the second proposition, that if an atmosphere of such kind is in fact created, that also, is elementary.* Is there anything that you want to add?
>
> "Mr. Smith: No, sir.
>
> "The Court: All right". (R. 1610-1611, emphasis added).

The trial court thus not only was aware of the precise point, he actually took the words out of the mouth of petitioner's counsel. Indeed, he went further and said no citation of authority was necessary since "that . . . is elemen-

tary" (R. 1161). Having restrained petitioner's counsel from going further and asserting the specific authorities supporting his motion for a mistrial on these grounds, petitioner should not be precluded from review by this Court, as respondent maintains, for not asserting specifically that it was a violation of the XIV Amendment upon which petitioner relied.

The trial court, thus, passed upon the specific point and denied that defendant was deprived of a fair trial.

In the Appellate Division which affirmed the judgment of conviction without opinion, petitioner maintained that he had been deprived of a fair trial in Point 4 of the questions presented to that Court, as follows:

> "The trial court displayed in open court its bias against Glass (petitioner), and brought about newspaper and radio publicity during the trial of highly prejudicial, inadmissible, collateral matters which undoubtedly came to the attention of the jury, creating such an atmosphere as made impossible any fair consideration by the jury of the defense and precluded the possibility of a fair trial."

Of necessity, the affirmance of the judgment of conviction by the intermediate court without opinion resulted in a denial of this very contention made by the petitioner in that court, and was necessarily involved in its decision. Similarly, as the point was raised in Point III of petitioner's brief in the Court of Appeals of the State of New York, the affirmance of the judgment of conviction by the Court of Appeals without opinion necessarily involved a denial of the petitioner's claim as made below and in the trial court.

Respondent contends in its brief, at page 24, that had present counsel been substituted in time to move to amend the remittitur of the Court of Appeals of the State of New York in order to indicate that that Court had passed upon this question, the motion would have been denied because petitioner had failed to use the specific words "violation of the XIV Amendment of the Constitution of the United States". No New York authority is cited for such a statement, and it is respectfully submitted that this Court's jurisdiction should not be foreclosed merely because of the bare assertion of respondent to this effect. An examination of the entire record in the trial court below and in the points asserted by petitioner in both the intermediate Court of Appeals and in the Court of Appeals of the State of New York would seem to indicate without question that petitioner clearly intended, and did in fact, raise a Federal claim of violation of the XIV Amendment of the Constitution of the United States by denying him a fair trial, and that the Court of Appeals, just as the Appellate Division, necessarily reviewed that question in its decision.

If there be any doubt that of necessity the Court of Appeals of the State of New York passed upon this Federal question in view of the entire record, petitioner respectfully requests that this cause be continued for an appropriate period to enable him to apply to the Court of Appeals of the State of New York for an amendment of the remittitur. *Loftus* v. *People of the State of Illinois*, 334 U. S. 804, 805-806; *Herb* v. *Pitcairn*, 324 U. S. 117, 127-128.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

LOUIS BENDER
MOSES L. KOVE
Attorneys for Petitioner